SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 40

Petition not printed

DONALD WADE,

Petitioner,

vs.

NATHAN MAYO, AS STATE PRISON CUSTODIAN OF THE STATE OF FLORIDA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER

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I

Opinions of the Courts Below

1. Order of the Circuit Court of the 15th Judicial Circuit of Florida in and for Palm Beach County quashing writ. (R. 5-6.)

2. Order of the Supreme Court of Florida dismissing the appeal of the Circuit Court of Palm Beach County, Florida. (R. 7-8.)

3. Final judgment of the Disfrict Court of the United States sustaining the petition of Donald Wade. (R. 53 and 61.)

4. Opinion of the U. S. Circuit Court of Appeals for the 5th Circuit reversing the order of the District Court for the Southern District of Florida. *Mayo* v. *Wade*, 158 Fed. (2nd) 614. (R. 67-74.)

II

Grounds of Jurisdiction

1. We believe that U. S. C. A. 28, Section 347 (a) sustains the jurisdiction of the Supreme Court of the United States in this cause.

2. The date of the judgment of the United States Circuit Court of Appeals for the 5th Circuit to be reviewed is November 22, 1946. This date is shown in the printed judgment mailed by the Clerk of the Circuit Court of Appeals of the 5th Circuit attached to the original petition for writ of certiorari. (R. 67-74.)

III

Concise Statement of the Case

1. Donald Wade was arrested for the offense of breaking and entering under the laws of the State of Florida on the 19th day of February, 1945, and placed in the county jail of Palm Beach County, Florida. On the 14th day of March, 1945, the appellant was tried and convicted and sentenced for breaking and entering. He was in the county jail from the time of his arrest on the 19th of February, until the following 14th of March. At that time he was called from the jail and brought to the court for trial. He informed the court that he was unable to employ counsel and requested the court to appoint counsel to represent him in

his trial. He was 18 years of age and had finished the 8th grade of school, but, of course, knew nothing of the practice in the courts.

2. In order to bring the constitutional question before the state courts, your petitioner filed in the Circuit Court of Palm Beach County, Florida, a writ of habeas corpus, asking discharge upon the grounds that he had not received a fair trial by reason of his poverty and inability to employ counsel in the trial, and such denied him his constitutional rights under the constitution of the State of Florida and of the United States. This motion was quashed in the Circuit Court and appealed to the Supreme Court of Florida. (R. 5-6.) On the 14th day of May, 1945, this appeal was dismissed by the Supreme Court of Florida. (R. 7-8.)

3. On the 8th day of May, 1946, a petition was filed in the District Court for the Southern District of Florida, Jacksonville Division, for writ of habeas corpus and the writ was allowed. The matter came on for hearing before the District Judge at Jacksonville, Florida, on the 17th day of May, 1946. The District Judge, after hearing the evidence in the cause, rendered his final judgment discharging your petitioner from the custody of the State Prison Custodian and remanding him to the Sheriff of the Criminal Court of Record, Palm Beach County, Florida, for such further proceedings as may be taken against said petitioner by the State of Florida under the information, and held that a denial of the petitioner's request under the circumstances involved in this cause, was a denial of due process, contrary to the 14th Amendment of the Federal Constitution, which renders void the judgment and commitment under which petitioner is held. (R. 53 and 61.)

4. Thereafter, the Honorable Nathan Mayo, State Prison Custodian, appealed from the District Court of the United States for the Southern District of Florida to the United

States Circuit Court of Appeals. The matter came on for hearing before the Circuit Court of Appeals of the Fifth Circuit and they reversed the decision of the District Court, for the reason that there had not been cited any case decided by the Supreme Court of the United States holding that the failure to appoint counsel to represent a defendant in a non-capital case in a state court is a denial of due process under the 14th Amendment, unless the law of the state requires such an appointment. (R. 67-74.) (158 So. (2nd) 614.)

IV

Specification of Errors

1. That the U. S. Circuit Court of Appeals of the 5th Circuit erred in finding and holding that a denial of counsel for the defendant by the state court was not a denial of due process under the 14th Amendment, unless the laws of the state require such an appointment.

2. That the U. S. Circuit Court of Appeals of the 5th Circuit erred in finding and holding that the District Court decision should be reversed.

3. That the U. S. Circuit Court of Appeals of the 5th Circuit erred in finding and holding that under the facts presented in this cause was not a violation of the due process of our laws, both State and Federal.

V

Argument

This case can be boiled down for the sake of brevity to one question. Where a boy 18 years of age, with only an 8th grade education, is arrested on February 19th and placed in jail and kept there until March 14th, and brought into court for trial without the benefit of counsel, although

counsel was requested, did he receive a fair and impartial trial under the due process guaranty of our Federal Constitution and the Constitution of the State of Florida?

I believe that it can be said without much fear of successful contradiction that where any man is charged with a crime and put in jail and kept there and brought into court and rushed right into a trial, without the benefit of counsel, that he certainly does not get a fair trial. I believe that this would apply to even a learned lawyer, who is not on the outside where he could investigate the charge against him; where he could not have the benefit of a law library in order to prepare his defense; where he could not do all the things necessary for a fair and impartial trial, it would certainly be embarrassing, even to him, where he was unable by reason of his poverty, to have this work done. Surely, it must be recognized that this condition would not give a young man a fair trial, who, on account of his poverty, was unable to have some one skilled in the practice of law look after his interest and to prepare a defense. It goes without saying, that such a condition could not meet the requirements of our constitution of a fair and impartial trial under the due process clause of the constitution.

It seems to be the trend of the courts to hold that where the legislature has provided for the appointment and pay of counsel in capital cases only, that it follows that by reason of this legislative enactment, that it is the law of this State that the court is not bound to appoint an attorney to represent a young man, who is poverty stricken and unable to employ counsel for a fair trial. But I do not think that is the practice or the law of this State. As was said in the case of *Cutts* v. *State*, 54 Fla. 21, 45 Sou. 491, the Supreme Court of Florida announced this law: "Where a party charged with a felony has been arraigned and is asked whether he has counsel to represent him and it appears that

he has no attorney and is unable to employ one, if he signifies his desire to be represented by one, it is the practice of the trial judge to appoint an attorney." The court further said in the same case that "It is the duty of counsel designated by the court to give his professional assistance to an accused person who is unable to employ counsel." In this same case, the court further says: "If the record fails to show whether the accused had counsel or not, or even if it shows that he did not have counsel, it is not grounds for a reversal, unless it further appears that the right to have counsel was denied."

This *Cutts v. State, supra,* is followed by *Weatherford* v. *State,* 79 Fla. 680, 681, 94 Sou. 507.

The case of *Cutts* v. *State* was cited approvingly by the Supreme Court of the United States in the case of *Powell* v. *Alabama,* 287 U. S. 70, 77 Law Ed. 171. This case was cited approvingly in consideration of the enunciation by the court of the fact that among the elements necessary to due process of law at a trial is to have the advice and assistance of counsel.

In citing this case in *Bettz* v. *Brady,* 186 Sou. 445, 86 Law Ed. 1605, the Supreme Court says: "In six (states) the provision (one of which is like the 6th Amendment) have been held not to require the appointment of counsel for indigent defendants." We believe that the court was in error in making that broad statement, from the fact that it is the practice of the State of Florida in her courts to appoint counsel for indigent defendants, as the courts fully recognize that they cannot obtain a fair trial without the aid of counsel. It is true that we have a law which required the appointment of counsel in capital cases and to be paid by the State. Yet, I do not believe that by the fact of having that law, that it changes our practice one bit. It should not. A fair trial is guaranteed and you

cannot have a fair trial without the aid of counsel. We believe that the correct position of Florida is set out in the *Betts* v. *Brady* case on page 479 of the U. S. Reports and page 1610 of the Law Ed., when Florida is placed in the category of requiring counsel by established practice judiciously approved.

The constitutional provision in the State of Florida provides as follows:

"Sec. II. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him."

In the construction of this constitutional provision, our Supreme Court has said as follows:

"Fundamental rights of a person charged with an offense, including the right of representation by counsel, must be respected and observed by officers when enforcing criminal laws. Walker *v.* State, 150 Fla. 476, 8 So. (2nd) 22."

"Requirement of this section that accused be heard by himself or counsel or both is more than right secured to accused, and is mandatory organic rule of procedure in all criminal prosecutions. Deeb *v.* State, 131 Fla. 632, 179 So. 894. In this case the court said: "The provisions of the Constitution that in all criminal prosecutions the accused shall have stated particular rights include an express specific command that the accused 'shall be heard by himself, or counsel, or both.'" These specific provisions are in addition to the rights secured by the general organic requirements of due process of law and equal protection of the laws; and all such organic guarantees and commands are designed to secure to an accused a fair trial in every aspect of a criminal prosecution in the name of the State."

"Requirement by this section that accused be heard by himself or counsel or both cannot be evaded, and full benefit thereof should not be denied by too strict an application of judicial or statutory rules of evidence or of procedure. Deeb *v.* State, 131 Fla. 362, 179 So. 894."

"Constitutional guaranty of fair and impartial trial contemplates benefit of counsel and ample opportunity to prepare for trial. Lowe *v.* State, 95 Fla. 81, 116 So. 240."

In the case of *Cristie* v. *State*, 94 Fla. 469, 114 So. 450, our Supreme Court said as follows:

"(2) Our country is committed to the doctrine that no matter what the crime one may be charged with, he is entitled to a fair and impartial trial by a jury of his peers. Such a trial contemplates counsel to look after his defense, compulsory attendance of witnesses, if need be, and a reasonable time in the light of all the prevailing circumstances to investigate, properly prepare and present his defense. When less than this is given, the spirit and purpose of the law is defeated. Moore *v.* State, 59 Fla. 23, 52 So. 971; State *v.* Pool, 50 La. Ann. 449, 23 So. 503; Browne *v.* State, 88 Fla. 457, 102 So. 546, Anderson *v.* State (Fla.) 110 So. 250."

In the case of *Bettz* v. *Brady*, 316 U. S. 455, 86 Law. Ed. 1595, the Supreme Court of the United States said: "In the light of this evidence, we are unable to say that the concept of due process incorporated in the 14th Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case." The court points out in this case, that it was tried before the judge without a jury; the man was 43 years old, of ordinary intelligence and ability to take care of his own interest at the trial of that narrow issue. It is quite clear that in Maryland, if the situation had been otherwise and it appeared that the petitioner was, for any reason, at a serious disadvantage by the reason of the lack of counsel, a refusal to appoint

would have resulted in the reversal of a judgment of conviction. Only recently, the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused tried without counsel had been handicapped by the lack of representation.

In the case at bar, instead of the man being 43 years old, he was 18. He had only an 8th grade education. The District Judge, before whom the testimony was taken, saw him and had a chance to weigh his intelligence and ability to take care of his interests in a trial of the case. The issue in the case at bar was entirely different from the narrow issue in the *Bettz* case. The only issue there presented was an alibi. Here the issue was a broad one of not guilty, denying each of the material allegations of the information.

The Supreme Court said in their decision in *Bettz* v. *Brady, supra,* "that the 14th Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and the fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for an offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." We are not asking the Court in this case to determine such a broad issue and to hold that in every case that if you do not furnish an indigent defendant with counsel upon his request, that such is denial of due process of law. We are only asking that, under the facts of this cause, that the Court hold that in this case, it was a denial of due process as the District Judge held in his decision.

We wish to call the Court's attention to the fact that the District Judge was formerly a Justice of the Supreme Court of Florida, before his appointment as United States District

Judge of the Southern District of Florida. He is, therefore, by reason of his long experience, very qualified to pass upon questions of this character. He saw the petitioner when he was brought before him in the habeas corpus case. He had a chance to weigh in his judicial mind the facts and circumstances which he saw and heard. The Supreme Court of the United States recognized that there are certain circumstances where the denial of counsel to an indigent defendant would be a denial of the due process clause of the Constitution of the United States. That was what the District Court decided in this case. Again, the Bill of Rights of the State of Maryland, under which the *Bettz* v. *Brady* case, *supra*, arose, does not read the same as the Bill of Rights under the Florida Constitution and the Constitution of the United States. The Maryland Constitution says that the defendant "should be allowed counsel." The Constitution of the State of Florida says "that the accused shall have the right to be heard by himself or counsel or both." The Constitution of the United States says "that the accused shall enjoy the right to have the assistance of counsel for his defense." In the latter case of the Constitution of the United States, the Supreme Court has held that the right to counsel is mandatory. It is almost the same identical language of the Constitution of Florida.

I do not get the logic of the reasoning that where the State has provided only for the appointment of counsel in the capital cases, that the legislature did not intend that they should have the right to counsel in all felony cases just for the reason that they passed a law requiring counsel in capital cases with pay. I believe that it was the intention of the legislature in this particular law, to provide compensation for attorneys appointed in capital cases, rather than to limit the right of appointments to only capital cases and not other serious felonies. This case carries a maxi-

mum of 20 years. In a capital case for murder, the defendant could be found guilty of a crime of a lesser degree, with a maximum less than 20 years. My idea is that it was made for the purpose of providing compensation in capital cases, rather than limiting the right to counsel, as guaranteed him under the Bill of Rights and under the due process clause of the Constitution of the United States.

In the case of *Williams* v. *State (Fla.)* 197 Sou. 562, the Supreme Court held: "Section 8375, C.G.L., authorizes the trial court to make the appointment of counsel for the defendant. High authority, independent of statute, holds that a trial court has the inherent right in the administration of justice, to appoint an attorney to represent an indigent defendant charged with a felony. See 14 Am. Jr. Par. 174. The attorney being an officer of the court, and when by the court appointed to represent, professionally, an indigent person charged with a felony, it then becomes his duty to render faithful and efficient professional services so that the courts may so function that the legal rights of an indigent defendant may be determined and justice administered according to law. These obligations rest on an attorney as an officer of the court, regardless of the enemies or the friends made by counsel while discharging his professional duties in the trial of a case before the courts."

In the case of *Deeb* v. *State (Fla.)*, 179 So. 894-895, the Supreme Court held: "The provisions of the Constitution that in all criminal prosecutions the accused shall have stated particular rights include an express specific command that the accused 'shall be heard by himself, or counsel or both.' These specific provisions are in addition to the rights secured by the general organic requirements of due process of law and equal protection of the laws; and all such organic guarantees and commands are designed to secure to an accused a fair trial in every aspect of a criminal prosecution in the name of the State. The absolute command of

the Constitution that 'in all criminal prosecutions, the accused * * * shall be heard by himself, or counsel, or both,' is more than right secured to an accused. It is a mandatory organic rule of procedure in all criminal prosecutions in all courts of this State."

In the case of *Williams* v. *Kaiser*, 323 U. S. 471, 89 L. Ed. 398, the Supreme Court of the United States held:

> "These considerations underscore what was said in Powell *v.* Alabama, Supra (287 U. S. 69, 77 L. Ed. 170, 53 S. Ct. 55, 84 A. L. R. 527): 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect'."

The fact that the legislature of Florida saw fit in capital cases to direct the appointment of counsel and for his pay, only emphasizes what the Supreme Court of the United States has said with reference to the necessity of counsel in felony cases. But the due process clause of the 14th Amendment does not even refer to life. It says liberty or property in which you are to have due process, which includes life. Just because a capital case might mean a death sentence, does not in anywise or in any manner take away

from us the guaranty of liberty by due process of law. It seems to follow that if the legislature recognized that counsel was necessary in capital cases, that it was certainly necessary in serious felony cases where liberty of the person is involved. When they did not go any further and make a provision for payment of those attorneys appointed in all felony cases, certainly does not argue that the right to counsel is not fundamental in all felony cases.

Conclusion

I am not asking the Supreme Court of the United States to decide anything in this case except that under the facts and circumstances presented under the laws and constitution of the State of Florida, and the Constitution of the United States, that a young man of the age of eighteen could not have obtained a fair and impartial trial without the benefit of counsel which he asked for in this case. The Judge of the District Court, who heard the facts, who saw the defendant himself, who heard the witnesses, decided that point in this particular case under the particular facts.

The State of Florida is depending entirely upon the case of *Betts* v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595, to sustain them in their contentions. The facts in the case of *Betts* v. *Brady, supra,* are entirely different from the facts in the present case. In that case, the man was 44 years of age and he was tried directly before the Judge himself, without a jury. As the court said in that case on page 1607 of the decision: "It is obvious that the Judge can much better control the course of the trial, and is in a better position to see impartial justice done, than when the formalities of a jury trial are involved." It seems that the majority of the Supreme Court recognize that principle of law. In addition thereto, the only question involved in that case was a question of alibi and none of the technicalities involved in a plea of not guilty and a jury trial. As I understand this

case, when for the reasons well set out, the court held that it did not think there was any violation of the due process clause of the Constitution of the United States.

There cannot be any doubt but that if this case had been brought before the Supreme Court under the facts and circumstances as shown in this record, there would be a reversal without question. For that reason, I have not set out many of the decisions of the Supreme Court of the United States along this line. Many of these cases hold that the right to counsel in criminal proceedings is fundamental. *Powell* v. *Alabama*, 287 U. S. 45, 70, 77 La. Ed. 158-171.

In the case of *Deeb* v. *State*, 131 Fla. 362, 179 Sou. 894, our Supreme Court of the State of Florida said: "Requirement of this section that accused be heard by himself or counsel or both, is more than a right secured to accused and is a mandatory organic rule of procedure in all criminal prosecutions." In *Cutts* v. *State*, *Supra*, the Supreme Court of Florida said: "It has been the general practice in trial courts in this state, when a party charged with felony has been brought to the bar for arraignment, to inquire of the accused whether he had counsel to represent him, and if, upon inquiry, it developed that he had no attorney and was unable to employ one, to ask the accused whether he desired one to represent him. If he signified his desire to be represented by counsel, then it has been the practice for the trial judge to appoint some attorney to represent the accused. This practice is in accord with the letter and spirit of section II of the Bill of Rights and Section 3969 of the General Statutes of 1906."

It seems that the Supreme Court of the United States recognized that under certain circumstances, such a denial of the request of an indigent defendant would be grounds for reversal as set out in *Betts* v. *Brady*. As was said in this case at page 86 of Law Ed. 1609, 316 U. S. 476, the dis-

senting opinion in the Supreme Court of the United States said: "Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the 'universal sense of justice' throughout this country." In 1854, for example, the Supreme Court of Indiana said: "It is not to be thought of in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial."

I believe that the court will take judicial cognizance of the fact that the preparation of a trial and being ready with your witnesses and the law of the case at the time of the trial, is probably more necessary than any other thing that a lawyer could do. To give his client a fair and impartial trial, under the law and facts, is to my mind the most important duty. I have refrained all during my practice to accept employment unless I had time in which to do that very thing. Our Constitution provides that you have got to be given time for preparation for trial. It is a recognized and fundamental principle of our procedure in the trial of criminal cases. May I be permitted to ask the court could a person eighteen years of age, without any knowledge of the practice and procedure in the trial of a criminal case, who is held in jail from about February 19th to March 14th, who is unable to employ counsel to represent him, who is unable to make the necessary preparations for trial by reason of his poverty and being held in jail himself, could you expect that he received a fair and impartial trial under such circumstances? I am only asking in this case for a decision by the Supreme Court based upon these facts, which are disputed. He was unable to employ counsel, he advised the court of this fact, he was only eighteen years of age, he was held in jail without the opportunity of being out and

doing something himself. I do not believe under these circumstances that we can truthfully say that he received a fair and impartial trial and that due process of law was guaranteed to him as provided under the Constitution of the United States under the facts in this case.

I am only interested in this case from the fact that I was brought up and reared in my early practice in the State of Georgia with the idea that in order to obtain a fair and impartial trial when charged with a serious felony, it was necessary that a lawyer be appointed in behalf of the defendant. There was never a case tried up there where a person was unable to employ counsel on account of his poverty but that the court appointed counsel to represent him. There is no legislative fiat requiring such. It is a recognized principle of the law. The attorney who is appointed by the court serves without remuneration, even in a capital case. I was brought up under that system, which I believe embodies the true principle of due process of law and a fair and impartial trial. A fair and impartial trial should prevail in every state. Without counsel to make the preparations, see that the witnesses are subpoenaed, see that you are properly charged, and to guide and lead every step of the trial, is a denial of a fair trial and due process of law. Georgia never paid a dime for these appointments. Florida pays in capital cases. But certainly, the fact that it pays only in capital cases, is no argument that you can obtain a fair trial without counsel in a serious felony. Such an act of legislature is no determination of our rights guaranteed to us under the Constitution of the State of Florida and the United States. That question is for determination only by the judiciary.

Respectfully submitted:

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